IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 44

WILLIAM SKINNER, AUGUST R. GUELDNER AND ALTON J. CHARBONNET,

Petitioners,

versus

STATE OF LOUISIANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana to Review "STATE OF LOUISIANA VS. WILLIAM SKINNER ET AL," No. 48,445 of the Docket of said Court.

PETITION FOR REHEARING ON DENIAL OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, William Skinner, August R. Gueldner and Alton J. Charbonnet, pray that this Court grant a rehearing of its order of January 27, 1969, wherein, by a vote of six to 3, this Court recalled the writ of certiorari as having been improvidently issued.

REASONS FOR GRANTING THE REHEARING AND ISSUING THE WRIT

In applying for a rehearing of the denial of certiorari here, petitioners find no problem in presenting new matter, not previously urged. The three points urged in our original application were merely errors which counsel arbitrarily selected with a view to presenting points deemed to be of greater national interest. As we will show, however, this Alice-in Wonderland travesty of a trial overflowed abundantly with procedural error. The errors we now discuss clearly amounted to denial of due process of law under the Federal Constitution and the results permitted here by the District Judge and sanctioned by the State Supreme Court bear little resemblance to due process as conceived elsewhere in the Union. Unless Louisiana is to be deemed a never-never land, entitled to pursue its own, home-made concept of due process and permitted to stand apart from the other States "grand, gloomy and peculiar", a rehearing should be granted.

For more than three years petitioners have remained in prison while this case worked its way to the summary docket of this Honorable Court. Under the stringent provisions of Lousiana law as to denial of bail after conviction, they have served these three years in prison without even the assurance that they will, be given credit for time served, quo ad their penitentiary sentences of 10, 16 and fifty years. Rather than submit to the injustice of this mock trial petitioners have elected to pursue to the bitter end the numerous errors committed below in the hope that somehow, somewhere, the full spotlight of judicial inquiry will be focused upon the dark corners of this shoddy imitation of a trial. Petitioners are well aware that the chances of obtaining a rehearing from denial of certiorari are, percentage wise, about on a par with completing a ninety nine

yard pass in the last thirty seconds of a football game. But such things have happened and, with a vote of six to three as it now stands, it may well be that two more inquiring minds upon this august bench will be prompted to take one more look at what has been allowed to pass for due process in Louisiana. Such a look will reveal that all the masking in Louisiana is not done on Mardi Gras and that the Louisiana brand of due process, in the respects indicated below, is shockingly different than that recognized throughout the rest of these still more or less United States:

THE COVER-UP OF A VICIOUS ENTRAPMENT

As noted in our original and supplemental briefs, the State undercover agents here, Fullington and Hebert, were originally trying to make a marijuana case against one of the employees of Skinner, petitioner herein. Skinner was a reputable dealer in second hand automobiles, operating two rather sizeable establishments. He had no previous history of any connection with narcotics, either as a user or pusher. Being unable to make a case against Skinner's employee, the agents set out to create a case against him. They had developed an elaborate "front" or "cover" for this investigation and it may well be that they were desirous of making some sort of case to justify the time and expense involved in setting up the trap for the employee. This "front" or "cover" consisted in having agent Fullington set up as an executive officer in a finance company which handled loans on automobiles. It was a company with which Skinner financed cars sold through his two places of business.

As a part of the defense of entrapment, the defense sought to show:

(a) That when the case against the employee of

Skinner fell through the State undercover officers sought to make a case against Skinner himself; and

(b) That the agent Fullington, as a step in this entrapment of Skinner, proceeded to "feel out" his influence with the latter by getting Skinner to lend him money for bets at the racetrack and get him dates with women.

The quid pro quo for such goodies, of course, was the approval by Fullington, on behalf of the finance company, of certain dubious loans which Skinner needed in his automobile business. Thus, the key issue in the defense of entrapment was whether or not agent Fullington was in fact approving bad loans as a device of ingratiating himself with Skinner. Yet the trial Judge abruptly shut off all inquiry as to this most important issue in the following manner: In Bill of Exceptions No. 8, Vol. 1, R. 160, the trial Judge made it impossible to show the manner in which agent Fullington entrapped Skinner by restricting the cross-examination of Agent Fullington. As will appear by the Bill reserved here, and the excerpts of testimony attached, a Mr. Keenan was the finance company boss of agent Fullington. Fullington was asked: (Vol. 1, R. 160)

BY MR. GILL:

Q. Did you at or about that time, while you were there and Mr. Keenan was there, have a discussion about the loans you were making?

A. I don't quite understand the question.

Q. Didn't you tell Mr. Keenan when he asked you about some of the loans you were approving—

BY MR. DOLAN:

I object.

BY THE COURT:

Sustained. ITS IRRELEVANT AND IMMATERIAL.

BY MR. GILL:

Didn't you tell Mr. Keenan that you had your reasons:

BY MR. DOLAN:

I object.

BY THE COURT:

I ruled on that. He cannot answer the question. I have ruled it is immaterial.

Thereupon the defense reserved a bill, urging specifically that the question was proper, both to attack the credibility of Fullington and to show the improper means whereby the entrapment was committed. (Vol. 1, R. 160, 161)

In his Per Curiam the trial Judge seeks to justify his action as follows: (Vol. 1, R. 162)

> "The defendants were on trial for selling and possessing narcotics and what loans of money the witness was making was certainly irrelevant and immaterial to the issues being tried."

The above, of course, wholly ignores the fact that this defense of entrapment had been urged even before trial, that extensive evidence had been taken in connection with a Special Plea of Entrapment, previously discussed in connection with the pre-trial hearings and that said defense was being repeatedly presented throughout the trial proper.

For example, in a separate bill of exception, immediately following, Bill No. 9, Vol. 1, R. 163, further inquiry was made of this same witness, Fullington, as to the manner in which he was misusing his finance company connec-

tion to entrap Skinner, and the modus operandi was described by the defense as follows: (Vol. 1, R. 163:)

> "Benjamin Fullington was practically donating the Finance Company's interest to Mr. Skinner for the purpose of ingratiating himself with him, * * * ".

Again, in Bill No. 10 (Vol. 1, R. 167, 169), the Court likewise unduly restricted cross examination of agent Fullington as to how he was approving bad loans through the finance company in order to entrap Skinner. In this last instance the Court, in his Per Curiam, came up with a new basis for his action. To the objection by the State that the question about the loan device was immaterial, the Court declared: (Vol. 1, R. 169)

> "I don't know whether it's irrelevant. I'll rule it's **repetitious.**"

The question was repetitious only in the sense that three times the defense had sought to show the entrapment device (*supra*) and the first two attempts had been repulsed on the grounds of irrelevancy. Thus, the answer sought had not been permitted at all. But, on the third go round the trial Judge finds the same attempt **repetitious.** The attempt, of course was repetitious, but the answer would not have been repetitious because the answer had never been permitted. This was weird.

The State Supreme Court, in its opinion on rehearing (at page 35, Appendix attached to petition for certiorari) merely compounds the mystery as to irrelevancy by simply concluding, without analysis:

> "We find that the evidence sought to be elicited was neither relevant nor material. We affirm the trial judge's per curiam to this bill."

There follows simply a direct quotation of the entire

Per Curiam of the trial Judge, which, as we have noted, simply concludes that the line of questioning was irrelevant and material without in any way disposing of the entrapment issue, with which the issue of using financial pressure via approval of Skinner's auto loans was directly connected.

By this ruling of the trial Court, (approved of by the enigmatic ruling of the State Supreme Court), the jury was thus denied the right to know how and why the undercover agents were able to persuade a reputable business man like Skinner to "set up" a contact for the agents to secure marijuana. Skinner had nothing in his past to connect him with marijuana, either as a user or a vendor. But, by dangling before his eyes the prospective approval of more bad or borderline automobile loans, which he needed, Fullington was able to trap him into setting up a meeting with a marijuana source.

This financial pressure was a vicious device aimed at creating a classic case of entrapment, i.e. causing a man to commit a crime who had no idea in the world of either using or selling marijuana. The jury was entitled to know this essential background fact as part of the picture of entrapment. But the ruling by the trial judge that it was "irrelevant", without explanation or discussion, was grossly prejudicial. Unless this grievous error is corrected, therefore, petitioners will go to the penitentiary for terms of 10, 16 and 50 years, respectively.

A BUTCHERING OF THE "BEST EVIDENCE" RULE

The grossly prejudicial procedure we complain of here was preserved below by Bill of Exceptions No. 24 (Vol. 1, R. 231) and relates to the exclusion of a bill of sale of an automobile on the date of the alleged offense. A

defense witness, Mrs. Virgil Niette, testified that she had been transacting some business at the Skinner automobile lot during the entire morning of May 21, 1965, during the very hours in which the State undercover agent was supposed to have been there and persuaded Skinner to set up a meeting later on that date whereby the agent could procure some marijuana. (Vol. III, R. 636 et sequo). She had testified that she had bought a second hand car some days before at the Skinner lot and there had been a delay as to delivery. On the 21 of May, at nine a.m., she indignantly "camped" on the doorstep of the Skinner auto lot, demanding delivery of the car she had purchased. Skinner was not there and she dogged the footsteps of defendant Gueldner all morning, demanding her car. SHE TESTIFIED THAT SKINNER DID NOT ARRIVE UNTIL ABOUT 1 P.M. AND THAT AGENT FULLINGTON, WHO WAS POINTED OUT TO HER IN THE COURTROOM, WAS NOT PRESENT AT ALL, ANYWHERE ON THE LOT, AND THAT SHE WAS THERE UNTIL ABOUT 2:30 p.m. (Vol. III, R. 628, 629). This contention, of course, struck at the vitals of the State theory, namely that Fullington had met with Skinner at the lot that morning and set up the meeting for the delivery of marijuana from Charbonnet later that evening. For, if Fullington was not even present at all, then the alleged meeting between him and Skinner or Gueldner was a lie, or at least another gross factual error.

Fullington had testified that he had gone to the lot at about 11 a.m. that morning, May 21, met Skinner and arranged with Skinner for the later contact with Charbonnet. (Vol. 3, R. 425)

Thus, if Mrs. Niette was to be believed, Fullington was dead wrong on two main points: (a) He was not present at the lot at any hour even close to 11 a.m. (because Mrs.

Niette was there continuously from 9 till 2:30) and (b) Skinner, with whom he was supposed to have set up the Charbonnet meeting, was not there at all.

Mrs. Niette had testified that she had been to the Skinner lot on three successive days, ending on May 21, 1965, the date of the alleged offense. To bolster her personal recollection of the crucial date, May 21, she relied in part upon the bill of sale for the automobile, which bill of sale she finally got on the crucial date, May 21, the time she was there all morning and failed to see either Skinner or Fullington there. When counsel for the defense showed her this document, the bill of sale dated May 21, and began to question her about the date, May 21, and the name of the party who signed it, THE COURT ON HIS OWN MOTION AND WITHOUT ANY OBJECTION BY THE STATE, STOPPED THIS LINE OF QUESTIONING AS FOLLOWS: (Vol. III, R. 630)

> BY THE COURT:
>
> This lady's testimony is the best evidence. Don't go to secondary evidence to confirm . . . its not permissible in law. YOU CAN'T ASK ABOUT IT AT ALL.
>
> BY MR. GILL:
>
> Your Honor says I can't introduce anything that pertains to this?
>
> BY THE COURT:
>
> That's the law.

Thereafter, a second attempt was made to have Mrs. Niette identify the address on the bill of sale, and this line of questioning was stopped by the Court as follows: (Vol. III, R. 632)

> BY THE COURT:
>
> I have told you this lady's testimony is the best evidence. It's the primary evidence. THIS IS

SECONDARY EVIDENCE AND CAN ONLY CORROBORATE HER TESTIMONY WHICH IS NOT PERMITTED UNDER THE LAW."

After this ruling, which denied the right to question the recipient of the bill of sale about its contents, counsel for defendants then offered the bill of sale itself in evidence, which offer was denied and a bill reserved. (Vol. III, R. 633).

In his Per Curiam the trial Judge reverses his field mysteriously and justifies the exclusion of the bill of sale, not on the grounds that it violated the best evidence rule (as he had indicated at trial) but simply on the grounds that it was "irrelevant and immaterial to the issues of the case being tried." (Vol. II, R. 233)

But, we respectfully submit, neither grounds justified the ruling of the Court. Certainly, the bill of sale, bearing the same date as the alleged offense, was a crucial piece of evidence and if it served to corroborate the witness as to the correct date, she could certainly testify that she received it on the date at issue, and the bill of sale itself was clearly admissible in order to corroborate her. In such a situation the best evidence rule had no more application than the Geneva Convention or The Rule in Shelley's Case. Where a party is testifying about events with which he is directly connected the documents themselves have been held admissible in many Federal cases. SEE: ALL NATIONS TRADING CO. INC. V. UNITED STATES, Fifth Cir. 1964, 338 F. 2d 501; RELEFORD VS. UNITED STATES, Ninth Cir. 1962, 309 F. 2d 706; CARROL V. UNITED STATES, Ninth Cir., 1964, 326 F. 2d 72. Moreover, the leading Louisiana case on the subject, STATE V. KELLY, 112 So. 2d 674 (1959) establishes a similar rule.

By this ruling, therefore, the trial Court, with his home-made version of the best evidence rule, excluded vital evidence which would have corroborated Mrs. Niette as to the correct date and have struck a mortal blow at the State's case. The Court, after having had an opportunity to explore the law which he had so confidently misconstrued at trial, abandoned his "best evidence" theory when it came time to write his Per Curiam. He then simply said it was all "irrelevant and immaterial". It would be difficult to conceive of a fact which would have been more relevant or more material than the question of whether or not agent Fullington was even present at the auto lot when he allegedly persuaded Skinner to set up the contact with Charbonnet.

"SYSTEM OR INTENT" RULE CARRIED TO RIDICULOUS EXTREME

We deal here with a series of four bills covering the same issue. i.e. the undue stretching of the rule as to "system or intent" whereby evidence of other offenses is admissible. (See Bills No. 6 (Vol. I, R. 149), No. 18 (Vol. I, R. 199), No. 19 (Vol. I, R. 206), and No. 21 (Vol. I, R. 214).)

By way of introduction, it should be observed that, when it comes to stretching the rule pertaining to evidence of other offenses for the purpose of showing system or intent, Louisiana appears to hold the world's record. The most glaring misapplication of this rule is to be found in the 1963 Louisiana Supreme Court decision of *STATE V. MORRIS*, 157 So. 2d 728, 245, La. 475. There a man was being tried for murder of a woman in a barroom. Applying the Louisiana version of the "system or intent" evidence rule, the State was permitted to show that the accused, SOME SEVEN YEARS PREVIOUSLY, had violently killed another person in a barroom. Just how a

barroom killing seven years previously could throw any light as to intent in the case being tried, was never explained. The Louisiana Court merely stated the rule and left it hanging in the air. (See opinion, last paragraph of page 729, 157 So. 2d through first column, page 730)

In the instant case the Louisiana version of the system or intent evidence rule came into play as follows:

The information charged the offense of sale and possession of marijuana on a single date, May 21, 1965. Under the guise of showing system or intent the State was permitted, over objection, to show another sale of marijuana at a **later** date, May 28, 1965. Then, although not a word had been said about anything but marijuana, after the agent **was alone with Charbonnet on this second alleged sale he prevailed upon him to procure some heroin.** Over a continuing objection, the agent, Hebert, was permitted to testify that Charbonnet then told him **that he could get some heroin at another address** but that he would not do so in the presence of the other agent, Fullington; that he would have to drop off Fullington and he, Charbonnet would then get the heroin elsewhere and deliver it elsewhere. (Vol. III, R. 578 through 580)

Thus, the evidence as to heroin transaction should not have been admitted under even the most liberal application of the system or intent evidence rule, because:

(a) There was not a scintilla of evidence that either Skinner or Gueldner had any thing to do with any heroin transaction or that they even knew of any such possibility;

(b) The supposed transaction was consummated at a completely different place; and,

(c) It is inconceivable that this heroin transaction could have thrown any light whatever upon the "intent"

of either Skinner or Gueldner (as to the marijuana offense a week earlier).

The prejudicial effect of this purported system or intent evidence, particularly the admission of the heroin transaction, was aggravated by the fact that the Court gave a conspiracy charge, although no conspiracy was charged in the information at all. This error as to the giving of the full blown conspiracy charge **was the original basis of reversal in the State Supreme Court.** The giving of this charge itself is not now urged as a basis of applying for this rehearing, because it was included in the three points on which certiorari was sought in this Court. But certainly this conspiracy charge can now be considered in the light of its effect upon the minds of a jury confronted with the ridiculously extended Louisiana version of system or intent evidence. This full blown conspiracy charge informed the jury that conspiracy was a sort of partnership in crime and that, during the life of the conspiracy, the acts of one conspirator were chargeable against the other. (Vol. II, R. 358) Thus, with this instruction before it and the three separate contraband transactions before it, the jury would have been hard put indeed to tell which transaction proved what in regard to the other. Was the May 28 heroin transaction (with which Skinner and Gueldner had no connection at all) supposed to relate back in some mysterious manner so as to show a guilty intent on their part as of the earlier date, May 21, the only date on which they were supposed to have committed a crime? Or was the May 28 marijuana transaction supposed to be considered retroactively so as to show guilty intent on May 21? Or was the heroin transaction chargeable against Skinner and Gueldner on the conspiracy theory of partnership in crime given by the trial Judge? In this context, we submit, much more than the intelligence of 12 jurors was required. This

situation called for the wisdom of the Twelve Apostles, briefed by the Holy Ghost.

In conclusion, we submit that this error alone would justify a rehearing herein from the standpoint of national interest. For, if a conspiracy charge can be applied to and joined with an application of a liberal system and intent rule, we need no longer pay lip service to the theory that a man must defend only against the specific offense charged.

For the foregoing reasons we respectfully submit that a rehearing should be granted, that the writ should be granted and that the judgment below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

Of Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Geo. M. Leppert, a member of the Bar of this Court in good standing and of counsel for petitioners in the above application for rehearing, do hereby certify that a copy of the foregoing petition for rehearing has been served upon the District Attorney for the Parish of Orleans, State of Louisiana and the Attorney General of Louisiana by posting same, postage prepaid, addressed to their respective offices on the_____day of Feb., 1969.

Geo. M. Leppert